IN THE SUPREME COURT OF MISSOURI

SC92208

ARNAZ CRAWFORD
APPELLANT
VS.
DIVISION OF EMPLOYMENT SECURITY
RESPONDENT

Appeal from the Decisions of
The Labor and Industrial Relations Commission
Division of Employment Security Nos. 10-1496-G-A, et.al.
Appeal No. ED96130

APPELLANT'S SUBSTITUTE BRIEF

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

This is a consolidated appeal from four Orders entered by the Labor and Industrial Relations Commission on December 10, 2010, which affirmed four Decisions of the Appeals Tribunal of the Division of Employment Security which held that Claimant was ineligible for unemployment insurance benefits because he was not able to work from December 26, 2009 through March, 20, 2010 and had been overpaid benefits for that same period. (See e.g. LF 7-12, 18-19)[1] Section 288.210 R.S.Mo. provides that claimants may appeal decisions of the Commission to the Missouri appellate court having jurisdiction in the area where the claimant resides. Mr. Crawford resides in St. Charles County,

[1] Citations to "LF" followed by numbers refer to pages of the Legal File. There were two consolidated hearings and there are two transcripts, Volume 1 and Volume 2, which are numbered consecutively, with Volume I ending with page 145 and Volume II starting with page 146. Citations to "Tr1" followed by a page number refer to the first transcript for Appeals 10-14956 G-A and 10-14958 R-A. References to "Tr2" followed by a page number, if any, would be to pages of the second transcript for Appeals 10-14957 G-A and 10-14959 R-A.. There are separate and different Division's Exhibits D-1, D-2 and D-3 attached to Volume 1 and D-2 and D-3 attached to Volume 2. Claimant's Exhibits 1, 2 and 3 are attached to the first transcript, Volume 1. References in this Brief such as "C-1" are to Claimant's exhibits.

Missouri. Therefore, proper venue and jurisdiction was with the Court of Appeals for the Eastern District of Missouri. After the Court of Appeals issued its opinion and Appellant's Application for Transfer filed with the Court of Appeals under Rule 83.02 Mo.R.Civ.P. was denied, Appellant Crawford filed an Application for Transfer pursuant to Rule 83.04, which was granted by this Court January 31, 2012.

INTRODUCTION

In this Substitute Brief Appellant/Claimant Arnaz Crawford follows the same basic format as in his Brief filed with the Court of Appeals. Arguments in this Substitute Brief include to a certain extent matters that were advanced or more fully discussed in the Respondent's Brief and Appellant's Reply Brief before the Court of Appeals.

There are two basic issues. The first concerns the two determinations made March 31, 2010 by Respondent Division of Employment Security finding that Arnaz Crawford was not able to work within the meaning of Section 288.040.1 R.S.Mo and so was ineligible for benefits for weeks which he had already claimed and received benefits. Appellant contends these decisions were fundamentally and procedurally flawed, unauthorized and unlawful as well as factually incorrect. The second issue concerns two determinations made by Respondent, on April 13, 2010, finding that Appellant Crawford had been overpaid unemployment benefits. If the

first "able to work, eligible for benefits" determinations are reversed, then Mr. Crawford has not been overpaid benefits. Furthermore, Appellant contends that the position taken by Respondent Division of Employment Security, articulated for the first time in its Brief before the Court of Appeals, to the effect that Mr. Crawford must repay these allegedly overpaid benefits is illogical, invalid, depends upon an improper construction of the statute and amounts to an unconstitutional penalty, seizure of property and interference with Mr. Crawford's rights to seek benefits under the Federal Social Security Administration program.

Mr. Crawford's relevant claims extended across two benefit years and so there were four determinations, four administrative appeals, four Decisions of Appeals Tribunal, four Orders from the Labor and Industrial Relations Commission, and four Appeals to this Court. They all concern the same closely related issues, based upon a fairly simple series of events which present in a complicated bureaucratic context.

Claimant Crawford[2] has long been under the care of doctors due to a serious mental condition. This health problem always created difficulties with school and

[2] Arnaz Crawford sometimes uses the nickname "Ricky" and also is known as Arnaz Crawford, Jr.

work; but he did have several jobs since graduating from high school and was gainfully employed for years at a time. The end of a Wal-Mart job coincided with a hospitalization in December, 2008 or January 2009. Mr. Crawford's doctor was of the opinion that his illness had advanced to the point that Mr. Crawford should stop thinking about work, concentrate on his health and apply for Social Security disability benefits. Mr. Crawford applied in January 2009 but disability benefits were denied; the Social Security office determined that he was not disabled. So, Mr. Crawford continued to search for work and claimed and received unemployment insurance benefits for a number of weeks from July 26, 2009 until March of 2010 when an Administrative Law Judge (ALJ) with the Social Security Administration issued a Decision finding that Mr. Crawford was disabled within the meaning of the Social Security Act (SSA) and applicable regulations. As a result, the Division of Employment Security changed its determinations, found that Mr. Crawford was ineligible for benefits because he was "disabled" and therefore not able to work; and then determined that he had been overpaid benefits for certain of the weeks covered by the ruling of the Social Security Administration Law Judge. The Division has demanded that Mr. Crawford pay back those benefits.

Appellant contends here that the Deputy's redeterminations were unauthorized procedurally, as were subsequent Decisions of the Commission; that

he was able to work under Missouri's Employment Security Law, Chapter 288 R.S.Mo.; and that even if he has been overpaid benefits, the overpayment was not the result of any misrepresentation on his part, so that the Division of Employment Security is limited in its ability to recoup the overpayment.

STATEMENT OF FACTS

PROCEDURAL HISTORY PRIOR TO THE DECISION OF THE SOCIAL SECURITY ADMINISTRATIVE LAW JUDGE.

According to his best recollection, Arnaz Crawford worked as a dishwasher at a casino for about three years until he lost that job sometime in 2008. C-1, Tr1, 69.[3] Then he worked for about six months until he was laid off in late 2008 or January 2009. *Id*. Since January 2009 he had only a few days' work with two employers. *Id.* His recollection in this regard is generally consistent with the Division's records.

The records of the Division of Employment Security show that Mr. Crawford established a benefit year beginning July 26, 2009 (BYB7-26-09) when he filed a

[3] Exhibit C-1 is an affidavit prepared by Mr. Crawford and received into evidence at the hearing.

claim July 27, 2009 following a lay off for lack of work June 17, 2009 (LAST DAY WK). Tr1,77. There was a previous benefit year beginning July 20, 2008. *Id*. This earlier benefit year must have been established after the casino dishwashing job mentioned below. Arnaz Crawford received unemployment benefits on a weekly basis through the week ending March 20, 2010; however, the Division established a new benefit year for Mr. Crawford beginning January 24, 2010. Tr1, 98.[4]

FACTS REGARDING ARNAZ CRAWFORD'S WORK AND CLAIMS FOR BENEFITS.

Claimant Arnaz Crawford and his twin sister were born May 11, 1981. C-1; Tr1, 39-40. They were premature, weighed about 3 pounds each and spent two or three months in a neonatal intensive care unit. *Id.* The sister was diagnosed at an early age with a serious, disabling mental disorder; and Arnaz Crawford's doctors were concerned that he might, at some time, require more attention to mental or psychiatric problems which existed from the time of birth. *Id.* Tr1, 39-40. School always was difficult for Mr. Crawford, who attended special classes or classes for learning disabled students; but he did graduate from high school. C-1; Tr1, 40-42,

[4] Appellant Crawford does not know why a new benefit year was established January 24, 2010; but Appellant believes this is why there are four determinations and appeals rather than two.

68. From time to time he took classes at St. Charles Community College, Forest Park Community College and a cooking school; but he did not earn a degree. *Id.* Mr. Crawford persisted in his efforts to complete his education and be gainfully employed and generally remain self-sufficient because he did not want to "go through what my sister went through." Tr1, 42.

Mr. Crawford was employed on a regular basis following high school working in a factory, at a warehouse, passing out flyers door-to-door and working as a short order cook; C-1; Tr1, 44 He applied for unemployment insurance benefits when out of work. C-1; Tr1, 69.

One of the longest periods of employment was at a casino where he worked full-time as a dishwasher for about three years. C-1. That job ended sometime in 2008. C-1; Tr1, 44. Thereafter Mr. Crawford worked at Wal-Mart for about six months until sometime in December 2008 or January 2009. C-1; Tr1, 44. Since January 2009 he had only had a few days' work at an Arby's fast food restaurant and for another brief period handing out flyers. C-1; T1, 46.

After Mr. Crawford lost his Wal-Mart job in January 2009, his doctor thought his illness or condition had progressed to the point that he might be entitled to Federal assistance and so recommended that he apply for Social Security benefits. C-1. That is what he did. C-1. Initially the Social Security Administration

determined that he was not disabled; and so he claimed unemployment insurance benefits. C-1.

All the while he applied for unemployment insurance benefits Mr. Crawford searched for work; he always was willing and able to accept the type of work he had done over the years. C-1. For example, he applied for work at the Arby's Restaurant one day when he was driving, looking for a job, and noticed a new building; he went in, asked for a job and was hired. Tr1, 46. He was laid off after a day or two. *Id.* He also remained in communication with former employers; that is how he had work for a day or two handing out flyers for a contractor. *Id.* In the meantime, with the assistance of his mother and an attorney, he pursued the claim for disability benefits under the Social Security rules. C-1. In March 2010 the Social Security Administration determined that he was disabled under the Social Security rules and regulations. C-1; C-2. The Division of Employment Security was informed about the activities of the Social Security Administration and the Social Security Administration likewise always has been aware of unemployment insurance matters. C-1; Tr1, 57. Mr. Crawford never misrepresented his situation in any respect when he filed his claim for unemployment insurance benefits. C-1. He was constantly searching for work and able and available for work . When the Social Security Administration ALJ decided in March 2010 that Mr. Crawford was

entitled to disability benefits, he stopped claiming unemployment insurance benefits. Tr1, 58. Arnaz Crawford still would have preferred to continue to search for work; but his mother persuaded him to concentrate on his treatments. C-1; Tr1, 58.

Although he eventually was determined to be entitled to certain Social Security payments for weeks when he was paid unemployment insurance benefits, the Social Security Administration considered those benefits as "income" and reduced the amount of Social Security payments accordingly. C-1; C-3; Tr1, 56.

The Decision of the Social Security Administration

An Administrative Law Judge heard Mr. Crawford's appeal from the denial of social security disability benefits and considered testimony from Mr. Crawford and a vocational expert as well as reports of Mr. Crawford's treating physician and a psychological consultive evaluation conducted subsequent to the hearing. C-2; Tr1, 72-80. In his March 2, 2010 Decision the ALJ explained there were two general issues: the first was whether Mr. Crawford had earned enough wages to be covered under the Social Security Act and the second was whether he was disabled. Tr1, 72. A review of Claimant's earnings history showed sufficient wages for coverage and the entire record persuaded the ALJ that Mr. Crawford was disabled under the Social Security Law and regulations. *Id.* The findings of fact and conclusions of

law regarding Mr. Crawford, set out in numbered paragraphs, included: no substantial gainful activity since January, 2009; severe mental impairments or disabilities; mentally incapable of full-time employment; and, considering his education, experience and residual functional capacity, jobs for Mr. Crawford did not exist in significant numbers. Tr1, 74-78. Mr. Crawford was determined to be eligible for disability insurance (SSDI) and supplemental security income (SSI) under the Social Security Act. See page 8 of the ALJ Decision, C-2, Tr1, 79. The component of the SSA responsible for SSI was directed to calculate the amount of benefits. *Id.*

During the next few weeks the SSI component of the SSA sent Mr. Crawford several documents describing the benefit program in general and benefits he could expect in his particular case. C-3; Tr1, 81-113. For example, recipients such as Mr. Crawford could work and earn some money and still be entitled to Social Security benefits, and they were encouraged to work. Tr1, 81-83, 89-90. The SSA calculated that Mr. Crawford received "other unearned income" for December 2009 through January 2010 and in February and March of 2010 in certain amounts, so Social Security benefits he would have received otherwise were not paid. Tr1, 82, 94-95. That "other unearned income" was Claimant's unemployment insurance benefits. Tr1, 56-57, 70. These calculations were complete by March 29, 2010

when Mr. Crawford was informed of the reductions in his retroactive SSA payments. C-3.

The Deputy's Determinations

The Social Security ALJ issued his decision on March 2, 2010. C-2; Tr1, 80. Between that date and March 29, 2010 the Division and the SSA communicated regarding the amount of unemployment benefits which had been received and Mr. Crawford was informed of the calculations by letter dated March 29, 2010. C-1; C-3; Tr1, 56. Two days later, on March 31, 2010 the Division's Deputy determined that Claimant Arnaz Crawford was ineligible for benefits beginning December 20, 2009 on a finding that he was not able to work because of a disability which prevented him from working. LF 44; Tr1, 127. That same day, March 31, 2010, the Deputy determined that he was likewise ineligible from January 24, 2010 because of disability. LF 2; Tr144. The Deputy's reason and rationale was essentially the same in each case: Claimant is unable to work/100% disability/awarded disability benefits. Tr1, 123, 138.

On April 13, 2010 the Deputy issued two additional determinations. One was that Mr. Crawford was overpaid benefits for the week ending August 1, 2009 and for the four weeks from December 20, 2009 through July 23, 2010 for a total overpayment of $1,320.00 on a finding that he was paid benefits during a period of

ineligibility. LF 66. The other determination was that he was overpaid a total of $1,760.00 for the eight weeks from January 24 through March 20, 2010 for the same reason: he was paid during a period of ineligibility. LF 25. The overpayment determination contained this "boilerplate" language:

> THIS OVERPAYMENT IS A RESULT OF YOUR ERROR
>
> OR OMISSION.

> Section 288.380 RSMo. provides in part: "Any person who, by reason of any error or omission or because of a lack of knowledge of material fact on the part of the division, has received any sum of benefits pursuant to this chapter while any conditions for the receipt of benefits imposed by this chapter were not fulfilled in such person's case, or while such person was disqualified from receiving benefits, shall after an opportunity for a fair hearing pursuant to subsection 2 of Section 288.190 have such sums deducted from any further benefits payable to such person pursuant to this chapter. Recovering overpaid unemployment compensation benefits which are a result of error or omission on the part of the claimant shall be pursued by the division through billing and offsets against state income tax refunds."

Decisions of Appeals Tribunal

The above determinations resulted in four appeals which were heard in a consolidated hearing on June 2, 2010. Arnaz Crawford testified and so did his mother Laressa Crawford. No witness testified on behalf of the Division of Employment Security. In due course the Appeals Tribunal issued four Decisions.

The determinations that Mr. Crawford was ineligible for benefits were affirmed. LF 7-12, 49-54. The relevant findings of fact and conclusions of law essentially copied the Decision of the Social Security ALJ which had been introduced into evidence. *Id.*[5] The Appeals Tribunal's factual findings were to note, in separate paragraphs, that the ALJ found the Appellant: had no substantial, gainful employment since January 29, 2009; suffered from severe mental impairments; is mentally incapable of full-time work; can perform no jobs which exist in significant numbers in the national economy; and has a disability as that term is defined for Social Security purposes. LF 8-9, 50-51. The conclusion of law

[5]There were findings of fact and conclusions of law regarding the timeliness of Mr. Crawford's appeals, which were not challenged before the Commission and which are not relevant to this Appeal.

was that Mr. Crawford was ineligible for benefits because to hold otherwise would be inconsistent with the ALJ's Decision. LF 10-11, 52-53.

The overpayment Decisions also were affirmed. Appellant argued at the hearing that if it was found he had been overpaid benefits, then the applicable provision of the statute was Subsection 13 of Section 288.380 and Mr. Crawford should not be forced to repay any overpayment. Tr2, 151-512, 167-168. The Appeals Tribunal indicated his agreement by stating at the beginning of the second hearing that there was no suggestion of misrepresentation or fraud on the part of Mr. Crawford, so only Section 288.380.13 would or could apply. Tr2, 152. Despite the fact that Subsection 13 of 288.380 was cited by the Appeals Tribunal in its Decisions, each Decision concluded with a "boilerplate" warning "you will be expected to repay any overpayment of benefits to the Division of Employment Security." LF 34, 75. The overpayment determinations were affirmed because the ineligibility determinations were affirmed. LF 31-34, 72-75.[6]

[6] The Appeals Tribunal also explained that the overpayment for the week ending August 1, 2009 was established because that was the "waiting week" which only became compensable after the later weeks were paid which Appellant accepts as a correct analysis under Section 288.040.1(4). See *Division of Employment Security v. Simmons*, 103 S.W.3d 910 (Mo. App. W.D. 2003).

Orders of the Commission

The Labor and Industrial Relations Commission affirmed all four Decisions of the Appeals Tribunal. With respect to the Decisions that the Claimant was overpaid benefits, the Commission adopted the Decision of the Appeals Tribunal as its own. LF 40, 81. The Commission modified the Decisions of the Appeals Tribunal, however, with respect to Appellant's eligibility for benefits. LF 18-19, 60-61. The Commission did not agree with the Appeals Tribunal's suggestion that it would always be inconsistent to hold a Claimant able to work under the Missouri Employment Security Law if the Claimant had been determined to be disabled pursuant to the rules or regulations governing the Social Security Administration. LF 22. The Commission nonetheless found that Appellant Arnaz Crawford was not able to work within the meaning of Section 288.040.1(2) R.S. Mo. and therefore he was not eligible for benefits during relevant times. The Commission recognized Mr. Crawford's "willingness and earnest attempts to seek and secure work," but concluded that his restrictions were so severe that he could not be considered "able" to work. The fact that two employers were willing to give him a chance to work but Claimant was not able to keep those jobs more than a day or two was considered by the Commission to be evidence of his inability, or disability. *Id*.

POINTS RELIED ON

POINT I.

The Commission erred in Decision Nos. LC-10-03334 and LC-10-03336 which affirmed the deputy's determinations and the decisions of the Appeals Tribunal that Appellant Crawford was not able to work and therefore ineligible for benefits under Section 288.0040.1(2) because:

A. The Division's determinations of ineligibility and overpayment violated the Supremacy Clause of the U.S. Constitution in that they were in direct conflict with the decisions and calculations of the Social Security Administration implementing the March 2, 2010 Decision of the ALJ according to the Social Security Act and Federal Regulations;

B. The Division's initial determinations that Appellant Crawford was entitled to those benefits were reconsidered by the deputy without good cause in violation of Section 288.070.5 in that the March 31,

2010 determinations that Appellant Crawford was not eligible for the benefits he had already received were based upon factual findings and a conclusion of law made by an administrative law judge in a separate proceeding not brought under Chapter 288 of the Missouri Revised Statutes; and were contrary to the procedure and policy announced in Section 288.040.4(3) and 8 C.S.R. 10-3.050;

C. The Decisions violated Section 288.215 R.S.Mo in that they were based upon factual findings and a conclusion of law made by an administrative law judge in a separate proceeding not brought under Chap. 288 R.S.Mo.; and/or

D. They were not supported by substantial, competent evidence in that Mr. Crawford's evidence was that he was able to work and there was no substantial, competent evidence to the contrary.

Section 288.070.5 R.S.Mo.

Section 288.215 R.S.Mo.

***Wagner v. Unemployment Compensation Comm'n*, 198 *S.W.2d 342 (Mo.* 1946).**

***Gibbons v. Ogden*, 22 U.S. 1 (1824).**

POINT II.

The Commission erred in Decision Nos. LC-10-03335 and LC-10-03337 which affirmed the deputy's determinations and the Decisions of the Appeals Tribunal that Appellant Crawford was overpaid benefits and would be expected to repay those benefits because:

A. The Claimant did not receive benefits during a period of ineligibility in that the determinations and decisions of ineligibility were erroneous and Appellant Crawford was able to work at all relevant times;

B. In the event there was an overpayment of benefits the Division cannot demand that Appellant Crawford repay the money to the Division in that the

overpayment was not the result of any nondisclosure or misrepresentation on Appellant's part, so the Division could seek recoupment only under Section 288.380.13 R.S.Mo.; and/or

C. The determination of an overpayment which Appellant Crawford must repay violates the Supremacy Clause of the U.S. Constitution in that it is an unacceptable penalty or burden imposed because Claimant exercised his rights under the Social Security Act.

***Wagner v. Unemployment Compensation Comm'n*, 198 *S.W.2d 342 (Mo.* 1946).**

***Campbell v. Labor and Industrial Relations Comm'n*, 907 S.W.2d 246 (Mo. App. W.D. 1995).**

***Nash v. Florida Industrial Comm'n*, 389 U.S. 235 (1967).**

ARGUMENT

Standard of Review

The Court's review of unemployment compensation cases is limited to deciding whether the Commission's decision is supported by competent, substantial evidence and authorized by law. Section 288.210 R.S.Mo.*; Williams v. Enterprise Rent-A-Car Services, LLC*, 297 S.W.3d 139, 142 (Mo.App. E.D. 2009). Whether the facts require that a claimant be disqualified or ineligible for benefits is a question of law which this Court reviews *de novo*. See *Wagner v. Unemployment Compensation* Comm'n, 198 S.W.2d 342, 344 (Mo. Banc 1946); *Williams v. Enterprise Rent-A-Car*, *supra*, 297 S.W.3d at 143. Eligibility requirements are strictly construed in favor of the claimant/employee and against the disallowance of benefits. *See* Section 288.020 R.S.Mo; *Mo. Division of Employment Sec. v. Labor Industrial Relations Comm'n*, 651 S.W.2d 145, 148 (Mo. banc 1983).

POINT I.

The Commission erred in Decision Nos. LC-10-03334 and LC-10-03336 which affirmed the deputy's determinations and the decisions of the Appeals Tribunal that Appellant Crawford was not able to work and

therefore ineligible for benefits under Section 288.0040.1(2) because:

A. The Division's determinations of ineligibility and overpayment violated the Supremacy Clause of the U.S. Constitution in that they were in direct conflict with the decisions and calculations of the Social Security Administration implementing the March 2, 2010 Decision of the ALJ according to the Social Security Act and Federal Regulations;

B. The Division's initial determinations that Appellant Crawford was entitled to those benefits were reconsidered by the deputy without good cause in violation of Section 288.070.5 in that the March 31, 2010 determinations that Appellant Crawford was not eligible for the benefits he had already received were based upon factual findings and a conclusion of law made by an administrative law judge in a separate proceeding not brought under Chapter 288 of the Missouri Revised Statutes; and were contrary to the procedure and policy

announced in Section 288.040.4(3) and 8 C.S.R. 10-3.050;

C. The Decisions violated Section 288.215 R.S.Mo in that they were based upon factual findings and a conclusion of law made by an administrative law judge in a separate proceeding not brought under Chap. 288 R.S.Mo.; and/or

D. They were not supported by substantial, competent evidence in that Mr. Crawford's evidence was that he was able to work and there was no substantial, competent evidence to the contrary.

A.

The Division's determinations overpayment conflict with the Social Security Act and Federal Regulations;

Both state and federal law allow a person to collect Social Security benefits and Unemployment benefits at the same time. Section 288.040.4(3), RSMo. specifically states that there will be no reduction in unemployment benefits based on social security payments, at least in a case like this where the Claimant has

contributed, by working for wages, to the Social Security Act. Therefore, the Division's March 31, 2010 determinations of ineligibility and subsequent decisions to declare an overpayment of Mr. Crawford's unemployment benefits because he received them and Social Security benefits are improper.

When a person applies for and is awarded Social Security benefits, the SSA follows a specific process for determining the amount of money due. See 20 CFR 416, generally. The SSA commenced the process of determining the amount of money Mr. Crawford was due following the March 2, 2010 Decision of the ALJ. This calculation considered the amount of unearned income Mr. Crawford received. Unearned income, for purposes of Social Security benefits, includes unemployment benefits. 20 CFR 416.1120-1121. Obviously, the fact that someone like Arnaz Crawford would receive both unemployment benefits and Social Security disability benefits was anticipated.

To determine if a person entitled to Social Security disability payments is receiving unemployment benefits, the SSA looks to a detailed and published procedure known as POMS, SI 00830.230. In addition to questioning a beneficiary like Arnaz Crawford the SSA queries various databases to confirm amounts received for weeks in question. If these databases do not yield complete results, then the SSA contacts the state agency directly. Once reliable amounts are

obtained, the SSA reduces the Social Security payments by the unemployment benefits already received. 20 CFR 416.1120-1124. These regulations and published procedures confirm the testimony of Claimant's mother as to the events of March, 2010. Tr1, 56-57.

In Mr. Crawford's case, the SSA went through this process, obtained information that Mr. Crawford was receiving unemployment benefits in certain amounts from the Division, and accordingly reduced his Social Security disability benefit for the particular weeks. In this way, the SSA relied on the Division's determination that Mr. Crawford was eligible for and properly receiving unemployment benefits. The Division indeed had previously determined Mr. Crawford was eligible for unemployment benefits. Otherwise, the SSA would not have reduced Mr. Crawford's Social Security benefits pursuant to 20 CFR 416.1120-1124. It would be absurd to imagine that after the March 2, 2010 ALJ Decisions the Division could legitimately confirm to the SSA that Claimant Crawford had received unemployment benefits in certain amounts for particular weeks, wait for the SSA to reduce Mr. Crawford's disability benefits as it did on March 29, 2010 (C-3, tr1, 81), revoke his eligibility for those benefits two days later, and then demand that he pay to the Division the exact amount withheld by the SSA. Missouri's statutes and regulations are clearly set up to avoid such an unfair

chain of events.

The Division's redetermination amounts to a violation of Section 288.040.4(3), R.S.Mo., which states that the Division cannot reduce unemployment benefits by any amount a claimant receives in Social Security benefits. In the event, for any reason, that statute does not apply, the Division's regulation 8 C.S.R. 10-3.050 prohibits a reduction of benefits in a case like this. Here, by retracting its eligibility determination, the Division is reducing Mr. Crawford's unemployment benefits to zero based on his subsequent collection of Social Security benefits in violation of that regulation.

The SSA regulations and protocols mentioned above constitute a comprehensive plan to fairly and reasonably deal with a situation like this where a person who receives unemployment benefits in good faith is later awarded Social Security disability benefits for the same weeks. This plan manifests the intent of Congress to prevent any other result. That goal is supported by Section 288.040.4(3) and 8 C.S.R. 10-3.050. The Division's action, affirmed by the Commission, to retroactively create an "ineligibility" and demand an "overpayment" is in conflict with that plan and an obstacle to its implementation. Thus those determinations are unconstitutional violations of the Supremacy Clause, Art. VI, cl. 2 of the U.S. Constitution. which must be reversed. See *Gibbons v.*

Ogden, 22 U.S. 1 (1834); Crosby, *v. Nat'l Foreign Trade Counsil*, 530 U.S. 363, 372-73 (2000). See also *Nash v. Florida Industrial Comm'n*, 389 U.S. 235 (1967) discussed below.

The statutes and regulations, state and federal, discussed above establish a net or protective barrier which should prevent anything as unfair as forcing someone who never did anything wrong to "repay" money which already has been taken from him in the form of reduced benefits. Arnaz Crawford did not fall through a crack. The Division opened up a fissure and pushed him through it.

B.

The Deputy had no authority to redetermine eligibility.

When the Division considered Mr. Crawford's claim for the weeks after July 26, 2009 and then paid benefits for those weeks, the Division necessarily made determinations that he was eligible for those benefits under Section 288.070. *Wagner v. Unemployment Compensation Comm'n, supra*. That is, for each week Arnaz Crawford was paid benefits, the Division concluded, and so determined, that he was able to work and available for work within the meaning of Section 288.040.1(2). When the Division changed its position after the Social Security Administrative ALJ issued its Decision and asserted Mr. Crawford was not entitled to those benefits, it was a redetermination. This was procedurally improper under

Section 288.070.5 R.S.Mo. because there was no "good cause" for such a redetermination. *Wagner, supra*.

Wagner v. Unemployment Compensation Comm'n was decided more than sixty years ago when the Missouri Employment Security Law was codified differently and decisions of the Commission were reviewed by the Circuit Court and thus could be appealed to the Missouri Supreme Court.

The *Wagner* claimant filed an initial claim for benefits after she was laid off by her employer, a glass company, due to lack of work. In due course the deputy determined she was an insured worker with a certain weekly benefit amount and that she was eligible for waiting week credit and benefits. She was paid benefits for several weeks until she refused work offered by a shoe company. While investigating the refusal of offered work, the deputy learned the claimant did not look for work or consider any available work because she hoped to be called back to work at the glass factory. *Wagner, supra*, 198 S.W.2d 342, 343-345. The deputy then determined that Ms. Wagner was ineligible for benefits since the time of her initial claim and that she had been overpaid benefits. The first issue facing the Supreme Court was whether the deputy had "good cause" under the statute to make a redetermination of eligibility. *Supra*, at 345. The second issue was, if she had been overpaid benefits, whether then she was required to repay those benefits or

whether such overpayments would be deducted from any future benefits payable to her. *Supra* at 347.

The deputy's rulings that the *Wagner* claimant was ineligible and so had been overpaid were affirmed by the Appeals Referee (Appeals Tribunal) and Commission. The Circuit Court reversed, however, concluding that the determinations made before the refusal of work had become final and could not be reconsidered by the deputy. *Supra* at 343. The Circuit Court reasoned that neither the Appeals Referee nor the Commission could have any greater authority than the deputy, even with the benefit of the claimant's testimony at the hearing, because their power or authority was derivative; so if the deputy had no authority to act, then neither did the Appeals Referee or the Commission. *Id*.

The Supreme Court noted that the earlier determinations of the deputy allowing benefits to be paid to the *Wagner* claimant could be reconsidered under the statute because the reconsideration was done during the same benefit year if the deputy had "good cause." *Wagner*, *supra* at 345-346. There was "good cause" under the statute (now Section 288.070.5) because the deputy had learned of new material facts which were unknown at the time of the earlier determinations and because the general purpose of the Missouri Employment Security Law as could be

learned from other statutory provisions supported the redetermination. *Id.* Neither factor can be found in the facts now before the Court.

In *Wagner* the deputy learned during the investigation of the job refusal that the claimant there had not looked for other work and would not have accepted other work because she was waiting to be called back to the glass factory. *Supra* at 344. This self-imposed restriction was confirmed at the hearing when the *Wagner* claimant testified. The Deputy in this case did not learn of any new, material facts about Arnaz Crawford's health or search for work. Arnaz Crawford did not refuse any job offers; to the contrary, he generated and accepted two job offers through his persistent efforts. The only new information which was brought to the Deputy's attention was the Decision of the Social Security Administration's ALJ, which under the statute should not be used to determine, or redetermine, eligibility.

Section 288.215 provides that the findings of fact and legal conclusion reached in a proceeding brought under another jurisdiction's statute cannot be the basis of a decision affecting the rights of a claimant to benefits under the Missouri Employment Security Law. Certainly, therefore, the decision in a quasi-judicial proceeding under the Social Security Act cannot be sufficient cause for the Division's Deputy to reconsider Mr. Crawford's eligibility for benefits.

The fact that Mr. Crawford had applied for Social Security disability benefits might be evidence of his ability and availability for work. See *In re Roehsler's Claim*, 243 N.Y.S.2d 971, 19 A.D.2d 927 (N.Y.App. 1963). That is, the fact that someone is claiming that he is so sick or injured that he is entitled to some sort of disability benefits could cause the Division to investigate, ask questions, and evaluate any assertions that someone is able to work within the meaning of Section 288.040.1(2). But Mr. Crawford's application for Social Security disability benefits in January or February of 2009 was a fact available to and known by the Division at the time Mr. Crawford applied for unemployment insurance benefits in July 2009 and subsequent weeks. The only reason the Division changed its position on March 31, 2009 was the Decision of the ALJ on March 2, 2009. This was unlawful under Section 288.215 and so could not be good cause under Section 288.070.5. *Wagner, supra*.

Section 288.040.4(3) and the Division's regulation 8 C.S.R. 10-3.050 also indicate that the Division's Deputy did not have "good cause" to reconsider Mr. Crawford's eligibility after the Decision of the Social Security ALJ. Section 288.040.4 provides that a claimant is ineligible for benefits if he received workers' compensation benefits, pension payments and funds from similar sources in excess of his weekly benefit amount. Subparagraph (3), however, qualifies that general

statement by stating Social Security payments in a situation like this where a claimant has earned wages and made Social Security contributions are not counted and do not reduce unemployment benefits. So, the March 2009 Decision of the ALJ awarding Social Security benefits cannot be good cause to find Mr. Crawford ineligible for benefits previously paid to him.

The rule implementing 288.040.4 is 8 C.S.R. 10-3.050. Subparagraph (3) of that regulation provides that if a claimant receives unemployment benefits while his right to receive disability payments or similar payments has not been determined, no benefits shall be denied for any week prior to the final decision allowing those disability payments. This case is analogous to the situation contemplated by that regulation, if it is not controlled by it: it is not the policy of the State of Missouri or its Division of Employment Security to penalize a claimant who receives unemployment benefits while his right to secure disability benefits is under review by a different governmental agency in a separate proceeding by making the claimant pay back the benefits if he prevails in that other proceeding.

The above regulations and statutes, like all provisions of the Missouri Employment Security law, are to be liberally construed in favor of the allowance of benefits. Section 288.020 R.S.Mo.; *Missouri Division of Employment Security v. Labor and Industrial Relations Comm'n*, 651 S.W.2d 145, 148 (Mo. banc 1983).

They should be read together in order to give effect to the stated public policy of Missouri, which can only support Appellant Crawford's right to the benefits he already has received.

The Division contends the issue of whether or not its Deputy had good cause to change the decisions that Arnaz Crawford was eligible for benefits within the meaning of Section 288.070.5 has been waived because it was not raised in Claimant's Application for Review before the Commission. The eligibility issue certainly was before the Commission. The Application for Review begins with a preprinted form which instructs applicants such as Arnaz Crawford that a statement of the reasons the Decision of the Appeals Tribunal is not correct is "optional." See LF 13, para 9. A claimant like Mr. Crawford does not waive an issue by failing to list every point or specifically identifying every argument in his Application for Review. Other than that Application for Review, there is no record of what topics were brought to the attention of the Commission or what matters it considered on its own. What is clear is the obligation of the Labor and Industrial Relations Commission to correctly apply all the laws that pertain to that issue. *Adams v. Division of Employment Security*, 353 S.W.3d 668 (Mo. App. 2011). Mr. Crawford did unambiguously contend that the law was incorrectly applied with respect to the determination that he was not eligible during the weeks in question. See e.g. LF 16.

The weakness of the "waiver" argument advanced by the Division can be seen by focusing on the term "issue." The "issue" under discussion now is the propriety of the Deputy's determinations of March 31, 2010 that Arnaz Crawford was not eligible for the benefits which had been paid to him. That issue, the authority and validity of those determinations, has always been before the Appeals Tribunal, the Commission and now is properly presented to this Court. It is an "argument" or more precisely, the use of a statute cited in support of an argument, which the Division is attacking.

The distinction between an "issue" and an "argument," in this context can be seen from the case relied upon by the Division, *St. John's Mercy Health System v. Division of Employment Security*, 273 S.W.3d 510 (Mo banc 2009). There the narrow question was whether a group of union nurses, unemployed during a strike or other labor/management dispute, were nonetheless entitled to unemployment benefits under a particular statute because the Hospital had been found guilty of an unfair labor dispute by a federal agency. The Hospital lost this precise issue applicable to all the claimant nurses as a group. The Hospital persisted, however, to contend on appeal that the Division, and the Commission had not determined whether the nurses, as individuals, were unemployed, able to work and available for work, so as to be eligible for benefits under Section 288.04.1. That issue of

individual eligibility of each of the several nurses had not been raised before appeal. There was no "determination" or "decision" to review and no evidence to consider. This was a totally new issue not before the Supreme Court in St. John's Mercy and therefore the Court did not consider it. In this case, the fundamental issue of Arnaz Crawford's ability to work has been contested from the very beginning. Nothing has been waived or abandoned. *Adams v. Division of Employment Security, supra*.

St. John's Mercy, supra, indicates in a general way why the March 31, 2010 determinations were improper. Arnaz Crawford and the SSA, with the assistance of Mr. Crawford's mother and the Division, were working on the calculation of his Social Security benefits pursuant to the March 2, 2010 ALJ Decision, the Social Security Act and the regulations mentioned above. This was the "issue" which needed to be addressed. There was no "issue" for the Division's legitimate attention.7

The need for the rule expressed in Section 288.070.5 is apparent here. Arnaz Crawford was not alone in his belief that the unemployment benefits were properly, and finally, his. As mentioned above, the SSA also relied upon the Division's

7 If the Division is correct, and it is too late for Mr. Crawford to raise Section 288.070.5, then the Division certainly cannot invoke Section 288.380.14 after the Commission has rendered its Decision that only Section 288.380.13 applies.

determination of his status and the payment of unemployment benefits to Mr. Crawford. The SSA obviously believed that the receipt of those unemployment benefits was proper and that the value of those benefits would remain with Mr. Crawford; otherwise, the SSA would not have reduced Mr. Crawford's retroactive Social Security payments by the amount of the unemployment benefits Claimant Crawford had received. It was illogical and manifestly unfair for the Division to go back and change the eligibility of Mr. Crawford and then demand that he pay those "overpaid" benefits back to the Division after the Social Security Administration had withheld funds from Mr. Crawford because of those funds.

In any event, without "good cause" the Division had no legal authority or power, no jurisdiction, to reconsider the previous decisions to allow benefits. *Wagner, supra,* 198 S.W. 2d 343. If the Deputy had no power to issue the determinations of March 31, 2010, then the Commission likewise had no jurisdiction. Id. Neither does this Court. The issue whether or not the Division had jurisdiction is fundamental; it cannot be waived.

Wagner explains that "good cause" to reconsider a determination under Section 288.070.5 can exist when the deputy learns of a new fact which makes the initial allowance of benefits ". . . in conflict with the Law's express provisions as well as out of harmony with the Law's remedial purpose." *Supra*, 198 S.W.2d at

346. Claimant submits that the ineligibility and subsequent overpayment determinations are out of harmony with Missouri's law and the Social Security Act.

C.

The Decisions were improperly based on the ALJ's findings and conclusions.

The March 31, 2010 determinations of ineligibility never should have been made because the Division's Deputy had no authority under Section 288.070.5. The eligibility Decisions of the Appeals Tribunal repeated the Deputy's error since those Decisions simply restated the findings of the Social Security ALJ, borrowed the ALJ's legal conclusion and made it the law of this case concerning Mr. Crawford's eligibility for benefits under 288.040. This clearly cannot be allowed under 288.215.

The Commission apparently recognized that this was not proper by modifying the Appeals Tribunal's Decisions to make it clear that entitlement to benefits under the Social Security Act does not automatically make a claimant ineligible for unemployment benefits. See LF 18, 60. Eligibility for benefits under Section 288.040.1(4) is determined on a case by case basis. See *Missouri Division of Employment Security*, *supra*, 651 S.W.2d at 151; *Rpcs, Inc. v. Waters*, 190 S.W.3d 580 (Mo. App. S.D. 2006). The Commission nonetheless used the factual

findings and analysis of the ALJ as the basis for its conclusion that Arnaz Crawford was not able to work within the meaning of 288.040.1(4).

Appellant Crawford is not attempting to deny the existence of the ALJ's Decision or challenge its results; he introduced it as Exhibit C-2. The reality of that Decision cannot become a "fact" which supports the retroactive denial of his benefits. Neither can the discussion of the evidence before the ALJ, even if one assumes the ALJ's summary of that evidence is accurate, be considered substantial, competent evidence to support the findings of fact and legal conclusions of the Commission. Such a practice is prohibited by 288.215 even if it were allowed under ordinary principles of jurisprudence.

The distinction between evidence before the Commission and the factual findings and legal conclusions of the ALJ can be illustrated by reference to the ALJ's conclusion No. 10 that there are "no jobs that exist in significant numbers in the national economy." Tr1, 78. This was a conclusion of law pertaining to the Social Security Act and certain specific federal regulations. *Id.* Neither that law nor those regulations were before the Commission. The ALJ's conclusion No. 10 was based upon an evaluation done by an expert witness, a vocational expert who testified at the Social Security hearing. Tr1, 78-79. There was no such expert testimony and no such evidence before the Commission. There is nothing in the

record before the Commission to support the finding that Mr. Crawford was not able to work other than the ALJ's opinion.

D.

There was no substantial, competent evidence that Mr. Crawford was not able to work.

There is no substantial, competent evidence that Mr. Crawford was not able to work in August 2009 or December 2009 through March 2010. Whether or not one is able to work depends on the facts of each case. *Missouri Division of Employment Security, supra*; *Rpcs, Inc. v. Waters, supra*.

Appellant Crawford has found few published opinions which discuss when an unemployed worker should be considered able to work within the meaning of Section 288.040.1(2). Whether a claimant is "able to work" is tested by considering if he or she is "available for work." In *Lauderdale v. Division of Employment Security*, 605 S.W.2d 174 (Mo. App. E.D. 1980) a pregnant woman on maternity leave from her regular job claimed she was able to do less strenuous work and was searching for such temporary employment. This Court explained that a claimant with infirmities who has self-imposed restrictions on the type of work which he or she will accept is not "available" for work. In *Rpcs, Inc., supra*, claimant's former employer contended that she was not eligible for benefits because of her vision

problems and her mandatory participation in a rehabilitation program. *Supra* at 587. The issue was resolved by looking to the claimant's availability for work. When her double vision was corrected by glasses, that claimant's "ability to find work" was not restricted and so she was eligible for benefits. *Supra* at 588. Likewise, as her hours of attendance at the rehabilitation program were flexible, it did not interfere with her ability to "find and maintain" employment. *Id.*

The Commission's observation that the two former employers that did provide a few days' work were unwilling to keep Mr. Crawford permanently suggests that this is evidence that appellant was not able to work. That is, the Commission seems to assume or take it for granted that Mr. Crawford's health was the reason those jobs were short lived. There is no evidence that Mr. Crawford lost those jobs for any reason other than lack of work. Tr1, 46. That is the reason suggested by the Divisions's records. Tr1,77. The Commission, like the Appeals Tribunal, felt it was bound by the Decision of the ALJ, not the testimony and other evidence presented at the hearing.

POINT II.

The Commission erred in Decision Nos. LC-10-03335 and LC-10-03337 which affirmed the deputy's determinations and the Decisions of the Appeals Tribunal

that Appellant Crawford was overpaid benefits and would be expected to repay those benefits because:

A. The Claimant did not receive benefits during a period of ineligibility in that the determinations and decisions of ineligibility were erroneous and Appellant Crawford was able to work at all relevant times;

B. In the event there was an overpayment of benefits the Division cannot demand that Appellant Crawford repay the money to the Division in that the overpayment was not the result of any nondisclosure or misrepresentation on Appellant's part, so the Division could seek recoupment only under Section 288.380.13 R.S.Mo.; and/or

C. The determination of an overpayment which Appellant Crawford must repay violates the Supremacy Clause of the U.S. Constitution in that it is an unacceptable penalty or burden imposed because Claimant exercised his rights under the Social Security Act.

A.

Appellant Crawford was not overpaid benefits for the weeks at issue since he was not ineligible for those unemployment benefits.

The Commission/Appeals Tribunal held that since Mr. Crawford was determined to be ineligible for benefits for the weeks at issue, then he was overpaid the benefits he received for those weeks. This is the correct analysis since Appellant does not deny that he was paid benefits for those weeks and does not dispute the amounts asserted by the Division. Likewise, if the March 31, 2010 determinations are reversed so Mr. Crawford was eligible for benefits for those weeks, then he has not been overpaid benefits under 288.030.13 or any other section of Chapter 288 R.S.Mo.

It should be remembered that Mr. Crawford has not, in fact, been "overpaid" anything since the Social Security Administration withheld benefits he otherwise would have been paid. He has not enjoyed a windfall; he has not been unjustly enriched. The only injustice would be if he were forced to pay thousands of dollars to the Division for weeks when Social Security deducted those amounts from his Federal payments.

B

Even if Claimant has been overpaid benefits, the Division can only recoup such benefits by deducting them from future unemployment insurance benefits.

As set out above, Arnaz Crawford was, as a matter of fact, based on all the evidence or any portion of the evidence, able to do the work he had done for years, available for work and activity and earnestly seeking such employment so that he was at all relevant times prior to the March 2, 2010 ALJ Decision, deemed to be eligible for benefits under 288.040.1(2). The benefits he received must be deemed to have been received legitimately by virtue of 8 CSR 10-3.050. But if the Court finds that there has been a technical overpayment, then it should also expressly find and state that if the Division attempts any recoupment, it can only be according to Subsection 13 of Section 288.380.

In his Appendix to this Brief Appellant Crawford has included a letter he received from the Division dated September 2, 2010, indicating its intention to force Mr. Crawford to repay the benefits, rather than recovering them from benefits he would otherwise receive in the future, despite the reliance of the Commission/Appeals Tribunal on Section 288.380.13. In its Brief before the Court of Appeals, Respondent Division made it crystal clear that it claimed the

right and power to impose the harshest penalties on Claimant Crawford, invoking for the first time Section 288.380.14

Appellant always has been concerned about the possibility that the Division of Employment Security would attempt to force him to repay allegedly overpaid benefits. This concern initially was provoked by preprinted "boilerplate" language on the deputy's overpayment determinations as set out above. Such statements are generic provisions not specific to Mr. Crawford. They certainly did not put Mr. Crawford on notice that he was subject to the very severe and punitive sanctions now claimed by the Division by reference to Section 288.030.14 even though Claimant did not misrepresent or omit any material fact.

Appellant/Claimant Arnaz Crawford challenged any determination or assertion that the overpayment was the result of his error or omission in his initial appeals: "It says, the overpayment is the result of your error or omission. False. No. We deny it." TR 153. In his Decisions the Appeals Tribunal found that only Section 288.380.13 applied so that the Division could only recoup the alleged overpayment from future benefits.[8] LF 31-34, 72-75. The Commission affirmed

[8]Certainly the Appeals Tribunal/Commission can decide that overpayments can be recouped only by withholding from future benefits by citing that section of the statute. See *Roberts v. Labor & Industrial Rel. Comm'n.*, 869 S.W.2d 139, 144

and adopted those Decisions. LF 40, 81. In effect, the Division asked the Court of Appeals to modify the Commission's ruling by invoking Subsection 14 of 288.380.

Subsection 14 cannot be given the construction urged by the Division. Section 288.380 in particular and the unemployment benefits law in general provide for a recovery of money from claimants only when there has been some act or misrepresentation to obtain benefits which were not deserved. This clearly apparent plan would be meaningless and the system grossly unfair to claimants as opposed to employers if the Division's point is upheld.

Section 388.380 makes certain acts unlawful. Subsection 3 prohibits any person from knowingly making a false statement. The statute then goes on to establish remedies available to the Division and penalties which can be imposed in various situations, depending on the degree of misconduct involved.

Subsection 9 states that in the event someone obtains benefits by fraud and a person does not repay those fraudulently obtained benefits, "such sum shall be collectible in the manner provided in Section 288.160 and 288.170 . . . ." Section 288.380.9(3). Sections 288.160 and 288.170, contemplate a "certificate of assessment" which can be filed with the clerk of the circuit court where it has the

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(Mo. App. W.D. 1993).

full effect of a judgment; except that no exemptions are allowed. Other debt collection efforts are authorized.

Subsection 12 applies to overpayments which result from the a non-fraudulent misrepresentation. In such a case the Division may either require repayment or have such overpayments deducted from future benefits.

Finally, subsection 13 applies to situations where there was an error or omission or lack of knowledge on the part of the Division which is not attributable to any conduct of the claimant; an overpayment which is not the claimant's "fault." In that class or category of cases, the Division can recoup the "overpayment" only by withholding future benefits. Section 288.380 thus presents a logical hierarchy of classifications where the most egregious misconduct may be punished most severely; misrepresentations, active or passive, which are not deemed to be deliberate attempts to wrongfully obtain benefits can, in the discretion of the Division, be recovered from the claimant or recouped from future benefits; and those situations where there is no misconduct or "fault" on the part of the claimant do not result in any penalty or allow the Division to establish a debt and demand repayment.

Subsection 14 states that the Division shall recover overpaid benefits from the person receiving them by billings, by seizing income tax refunds, and by

engaging in civil suits and other debt collecting efforts authorized for collecting overdue contributions from delinquent employers. If subsection 14 is to have the meaning assigned by the Division, then much of the rest of Section 288.380 is useless verbiage, and subsection 13 in particular is meaningless.

A single subsection of a statute must be considered *in pari materia* with the entire statute so that all provisions are, if reasonably possible, harmonized with each other. See *Board of Educ. St. Louis v. Missouri Bd. Educ.*, 271 S.W.3d 1, 17 (Mo banc 2008). One subsection cannot be interpreted to render some other subsection "mere surplusage." *Bold v. Giardano*, 310 S.W.3d 237, 242 (Mo. App. E.D. 2010). If there is a conflict, a specific statutory reference should take precedence; where general language follows subsections describing specific classes or categories the general language will be applied only to the applicable specific class or category in order to give effect to the entire legislation. *Missouri Title Loans v. City of St. Louis Bd. Of Adjustment*, 62 S.W.3d 408 (Mo. App. E.D. 2001). And courts will not construe a statute to achieve an absurd, unreasonable or unjust result. *Weeks v. State*, 140 S.W.3d 39, 47 (Mo. banc 2004).

Appellant/Claimant has not yet discovered a case interpreting Section 288.380.14. Nor are there cases known to Appellant/Claimant where someone who has received unemployment compensation benefits was later determined to have

been ineligible for such benefits because of a subsequent ruling by a Social Security Administrative Law Judge. [9] There are some cases from other jurisdictions, however, where statutes essentially the same as Section 288.380.12 were considered in situations where claimants who received unemployment insurance benefits later received "back pay" from their former employer which covered the same period of time. In a situation like that, where it is clear the claimant did not receive any benefits because of his non-disclosure or misrepresentation and was only determined to be ineligible for such benefits because of a subsequent ruling by a different judicial authority, it would be unfair and unlawful to allow the unemployment benefits to be recovered in <u>any fashion</u>, even if they were recovered

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[9] A somewhat analogous case is *Florence v. Department of Workforce Services*, 35 P.3d 1148 (Ut. App. 2001), In that case a deaf woman received Social Security disability payments (SSDI) and unemployment benefits and there was an overpayment to the extent she was paid both for the same period. The Utah statute, like the one at issue here, allowed for repayment of a "fault" overpayment while a "no-fault" overpayment would only be deducted from future benefits. *Id*. at note 4. The Court added there was no basis the claimant could be held at fault. *Id.* at note 6.

only by withholding future benefits otherwise payable. See *Texas Employment Commission v. Oliver*, 691 S.W.2d 819 (Tex. App. 1985) (after receiving benefits, unemployed claimant received an award of "back pay" from former employer). See also, *Jones v. Mississippi Employment Security Commission*, 648 So.2d 1138 (Miss. 1995) (no overpayment recoupment when discharged workers who received benefits later secure an award for NLRP violations); *Gatliff Coal Co. v. Kentucky Unemployment Insurance Comm'n*, 814 S.W.2d 564 (Ky. 1991) (award of "back pay" to workers who had received benefits).

Mr. Crawford did nothing wrong to secure the benefits at issue. He did not make any sort of intentional or accidental misrepresentation. He followed the law in every respect. Subsection 13 was the authority cited in the Decisions of the Commission/Appeal Tribunal. LF 32, 73. Subsection 12 should not even be considered. See e.g. *Wagner v. Unemployment Compensation Comm'n*, 198 *S.W.2d 342 (Mo.* 1946); *Campbell v. Labor and Industrial Relations Comm'n*, 907 S.W.2d 246 (Mo. App. W.D. 1995); *Roberts v. Labor and Industrial Relations Comm'n*, 869 S.W.2d 139 (Mo. App. W.D. 1993).

As there has been no finding, no evidence and no hint that Arnaz Crawford did anything dishonest, was untruthful in any respect, or withheld any fact, it is clear that the only way the Division can recoup this overpayment, if it insists on

doing so, is by deducting those amounts from any future benefits Mr. Crawford would otherwise receive. See e.g. *Wagner, supra*; *Campbell v. Labor and Industrial Relations Comm'n*, 907 S.W.2d 246 (Mo. App. W.D. 1995); *Roberts v. Labor and Industrial Relations Comm'n*, 869 S.W.2d 139 (Mo. App. W.D. 1993).

In *Wagner v. Unemployment Compensation Comm'n*, *supra*, the Missouri Supreme Court considered the question whether or not overpaid benefits can be recovered by forcing the claimant to pay the money back to the Division or whether the Commission/Division would be required to recoup the overpayment by withholding future benefits. The Missouri Supreme Court held that unless there was a finding that the claimant caused the overpayment by withholding information or misrepresenting facts, subsection 12 could not be applied, so that the Division could not attempt to recover the overpayment by any means other than having such sums deducted from any future benefits payable in accordance with subsection 13 (as it was then codified in 1946.) *Wagner*, *supra* at 198 S.W.2d 346-347.

Roberts v. Labor and Industrial Relations Comm'n, *supra*, focused on Section 288.070.8 (benefits are considered to have been due and payable) and the apparent contradiction created by Section 288.381. The Court considered that the only way to give effect to both statutes is to find that such a recovery of overpaid benefits, even though they were considered due and payable at the moment they

were paid, must be allowed under Section 288.381.1. In that case, however, claimant Roberts did not cause the overpayment, there was no fraudulent conduct, and therefore the Court held that the only way the Division could recover the overpayment was by deducting from future unemployment insurance benefits. *Id*.

In a footnote, the *Roberts* court indicated that the Division could, and must, consider the hardship which would be imposed upon an innocent claimant if the Division were allowed to recover overpaid benefits by any means. That footnote supported the claimant's position in *Campbell v. Labor and Industrial Relations Comm'n, supra*. The *Campbell* court considered general principles of statutory construction which more or less require courts to determine and enforce the intent of the legislature as it can be discovered from the plain language of the statute. *Campbell, supra* at 249. The Court also noted that the legislature provided particular guidance with respect to the unemployment insurance benefits statutory scheme by explaining that the goal or purpose was to provide unemployment benefits to those such as Arnaz Crawford who are unemployed through no fault of their own. *Id*.; Section 288.020 R.S.Mo. The Court then concluded that the footnote in the *Roberts* decision did not place a burden on the Division to consider the harsh results which would inevitably follow a determination that overpaid benefits must be recovered in a case like this because the statute did not

specifically direct the Division to consider "equity and good conscience" before demanding recoupment of overpayments. *Campbell*, *supra* at 250-251. The rule of law which controls this case, however, was restated and reaffirmed: where there is no finding that the overpayment was the result of any error, omission or misrepresentation on the part of the claimant, the benefits must be recovered only by deducting money from future unemployment insurance benefits. *Id*.

Dissenting opinions in those cases focused on the unjust enrichment of a claimant who was "double dipping" by receiving unemployment benefits and an award of back pay covering the same period of time. Arnaz Crawford was not "double dipping" and there is no suggestion that he is being unjustly enriched. His Social Security payments were reduced by the amount of the unemployment compensation.

The general reference to "recovering overpaid unemployment compensation benefits" in subsection 14 must be limited to those situations enumerated in subsections 1 through 13 where the Division is allowed to establish a debt (as in Section 288.175.2)and demand repayment of benefits. Any other interpretation would reduce subsection 13 to meaningless surplus words and would permit an unjust, unreasonable and absurd result of allowing the Division to recover benefits when the recipient has not been unjustly enriched and has not done anything but

exercise his rights under the Social Security Act. And it would be unconstitutional in violation of the Supremacy Clause, Art. VI, cl. 2 of the U.S. Constitution. *Nash v. Florida Industrial Comm'n*, 389 U.S. 235 (1967).

C.

Forcing Claimant to repay benefits under these circumstances would be an unconstitutional violation of the Supremacy Clause.

Nash, supra, involved a worker who was in conflict with her employer because of her union activities. She was laid off, applied for unemployment compensation and received benefits. When the Florida Commission learned that she also had filed a claim for back pay and reinstatement for violations of the National Labor Relations Act it concluded she effectively admitted she was unemployed due to a labor dispute, which rendered her ineligible for unemployment compensation benefits under the Florida law. The U. S. Supreme Court recognized that if the decision of the Florida Commission was correct, then someone in the position of the *Nash* claimant would have only two choices: (1) he could forego his rights under the federal legislation in order to receive unemployment compensation or (2) he could exercise his rights under the National Labor Relations Act and so abandon his right to receive unemployment benefits.

This was an unacceptable burden because it would tend to coerce a person to not exercise his rights under the federal legislation. For this reason, the action of the Florida Commission was void as an unconstitutional violation of the Supremacy Clause. *Nash, supra*. The Social Security Act, with its rules and regulations which allow for work, earnings and adjust for unemployment benefits, had preempted the field.

People like Arnaz Crawford would be in the same situation if the Division's interpretation of subsection 14 is correct. If he decided to exercise his rights and appeal the denial of disability benefits, which was his right under the Social Security Act, he would forsake his right to unemployment compensation. If he elected to receive unemployment, then he would lose his right to Social Security benefits. If he applied for unemployment compensation benefits and received them, and later prevailed with his claim for Social Security benefits he would be punished by the Division by being forced to "repay" overpaid benefits even though he did not receive an extra dime. Arguably the holding in *Nash* would prevent the subsequent determination by the Deputy that Arnaz Crawford had been ineligible for benefits at all. Certainly, the rationale and ruling of the U.S. Supreme Court requires that subsection 14 be construed in a manner which does not impose a penalty on

Claimant/Appellant Arnaz Crawford for seeking to enforce his rights under the Social Security Act.

CONCLUSION

Ricky Arnaz Crawford was properly deemed eligible for benefits at all relevant times. If he was not eligible it is only because of a subsequent final decision of a Social Security Administration Administrative Law Judge that he was entitled to disability payments, so the benefits paid to Mr. Crawford cannot be denied or reduced. All four determinations and the Decisions of the Commission should be reversed. And even if it is decided that Mr. Crawford was overpaid benefits due to some technicality, the Court should clearly state that the overpayment was not caused by any misrepresentation or fraud on his part, so any penalty or recovery would be limited to a reduction of future benefits.

CERTIFICATION PURSUANT TO RULE 84.06(c)

COMES NOW Claimant/Appellant Arnaz Crawford and certifies that this Brief includes the information required by Rule 55.03 and that the number of words in this Brief does not exceed 31,000 (about 10,584 words) and that the number lines of text (about 1,094) do not exceed 2,200.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing instrument was served via electronic filing system l upon the attorney of record for Respondent Division of Employment Security this 2d day of March, 2012: Ms. Jeannie Desir MitchellAttorney At Law Division of Employment Security421 East Dunklin StreetP. O. Box 59Jefferson City, MO 65101Fax: 573-751-7893

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Respectfully submitted,

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